133

Supreme Court, U.S.
FILED
09-75 JUL 21 2009
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES, INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES,

Petitioners/Cross-Respondents

v.

JONESFILM,

Respondent/Cross-Petitioner

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

BARRY L. GOLDIN, ESQ.
Counsel of Record
3744 Barrington Drive
Allentown, PA 18104-1759
(610) 336-6680
Attorney for Respondent/ Cross-Petitioner Jonesfilm

I

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Where part of a bifurcated arbitration decision was procured through threats and intimidation of witnesses and arbitrator which were found to have "permeated the arbitration", did the federal courts err in confirming that tainted part of the arbitration decision on the grounds that the threats and intimidation had been disclosed during and "permeated" that arbitration?

2. Where an arbitrant's threats against and intimidation of witnesses and arbitrator were found to have "permeated" the arbitration, did the federal courts err by confirming the tainted portion of the arbitration decision and so rewarding the threats and intimidation, rather than deeming those threats and intimidation to be binding admissions against interest as to matters contested by that arbitrant?

PARTIES INVOLVED

Respondent/Cross-Petitioner Jonesfilm is a Pennsylvania joint venture of Sidney Kimmel Presentations, Inc. and SKPI Corp., which in turn are affiliates of Sidney Kimmel.

Petitioners/Cross-Respondents are Peter Hoffman, Cinevisions, Seven Arts Pictures, Inc., Seven Arts Filmed Entertainment Limited, and Seven Arts Pictures PLC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Cross-Petitioner Jonesfilm discloses that it is a joint venture organized under the laws of the State of Pennsylvania. The two joint venturers of Jonesfilm are Sidney Kimmel Presentations, Inc., and SKPI Corp., both of which are Delaware corporations, and all of the shares of which are owned by Sidney Kimmel. There is no parent or publicly held company owning 10% of more of either corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	I
PARTIES INVOLVED	II
CORPORATE DISCLOSURE STATEMENT	II
CROSS-PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
RELEVANT PROVISIONS INVOLVED	2
SUMMARY	
Nature and Overview of the Dispute	2
STATEMENT OF FACTS	6
1. The 2004 AFMA Arbitration	6
2. The 2006 IFTA Arbitration	6
A. In the March 2006 Arbitration Hearings, Conducted without Threats and Intimidation, the Hoffman Companies Were Found To Have Breached the Agreement With Jonesfilm	7

Page

B. The Hoffman Parties Then Engaged against Witnesses and Arbitrator in Threats and Intimidation Which the Ninth Circuit Found "Permeated" the Autumn 2006 Bifurcated "Net Receipts" Hearings 7

3. The District Court Erroneously Refused to Vacate That Part of the Arbitration Award Which Declined to Award "Net Receipts" to Jonesfilm, as The District Court Mistakenly Believed It Could Not Vacate Only Part of the Award 9

4. The Ninth Circuit's Decision Instead Refused to Vacate Denial of "Net Receipts" on the Grounds That the Arbitrator Was Aware of the Threats and That "Those Threats Permeated the Entire Proceeding" 10

REASONS FOR GRANITNG THE WRIT 12

QUESTION 1. The Ninth Circuit Erred by Refusing to Vacate an Arbitration Award Where It Found Arbitrants Engaged in "Deplorable" Attempts to Intimidate Witnesses and the Arbitrator; the Arbitrator Was Aware of Those Threats; and Those Threats "Permeated the Entire Proceeding" 12

Page

A. The Threats and Intimidation against Arbitration Witnesses and Arbitrator Were Highly Improper 12

B. In Light of the Hoffman Parties' Threats against and Intimidation of Witnesses and Arbitrator as to the Bifurcated "Net Receipts" Portion of the Arbitration, the Courts Below Should Have Vacated the Tainted Denial of "Net Receipts" Due Jonesfilm 13

QUESTION 2. The Ninth Circuit Erred by Refusing to Deem Arbitrants' Threats and Intimidation to Be Admissions against Interest Binding against Them as to "Net Receipts" Due Jonesfilm 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Federal Cases

Bonar v. Dean Witter Reynolds, Inc.,
835 F.2d 1378 (11th Cir. 1988) 14

Chambers v. NASCO, Inc.,
501 U.S.. 32, 111 S. Ct. 2123, 115 L.Ed. 2d 27
(1991) 14

Comedy Club, Inc. v. Improv West Associates,
51 F.3d 833 (9th Cir. 2007) 10

Coutee v. Barington Capital Group, L.P.
336 F.3d 1128 (9th Cir. 2003) 11

Dixon v. CIR,
316 F.3d 1041 (9th Cir. 2003) 14

Geyer Roofing Inc. v. Roofers Local 30B,
(D.N.J. 1990), 736 F.S. 573 14

Great American Ins. Co. v. Horab,
309 F.2d 262 (8th Cir. 1962) 17

Lyle v. Rodgers,
18 U.S. (5 Wheat) 394, 5 L.Ed. 117 (1820) 11

McQueeny v. Wilmington Trust Co.,
779 F.2d 916 (3rd Cir. 1985) 16

	Page
Office and Professional Employees v. Washington Metro Area Transit Auth., 724 F.2d 133 (D.C. Cir. 1983)	14
Ty Inc. v. Softbelly's, Inc. 353 F.3d 528 (7th Cir. 2003)	13
Ty Inc. v. Softbelly's Inc., 517 F.3d 494 (7th Cir. 2008)	13
U.S. v. Willard, 230 F.3d 1093 (9th Cir. 2000)	12
State Cases	
Longuy v. La Societe Francaise de Bienfaisance Mutuelle, 52 Cal. App. 370, 198 P. 1011 (1921)	17
McCool v. Gehret, 657 A. 2d 269 (Del Sup. 1995)	17
Federal Statutes	
Federal Arbitration Act (9 U.S.C. §1 *et seq.)*	2
9 U.S.C. §10	2, 9, 12, 14
18 U.S.C. §1512	12
28 U.S.C. §1254	2
28 U.S.C. §1441	1

Page

Treatises

McCormick on Evidence, 6th Ed. (2006) §265 15

Wigmore on Evidence, Vol. 2 (1979 Ed) §278 16

CROSS-PETITION FOR WRIT OF CERTIORARI

Respondent/Cross-Petitioner Jonesfilm respectfully prays that a writ of certiorari issue to review that portion of the February 12, 2009 decision of the United States Court of Appeals for the Ninth Circuit which found that "deplorable" threats against and intimidation of witnesses "permeated" the bifurcated arbitration, but nonetheless affirmed denial of Jonesfilm's motion to vacate the tainted portion of the arbitration award.

That February 12, 2009 Ninth Circuit decision is the subject of a pending Petition for Writ of Certiorari filed by petitioners/cross-respondents Peter Hoffman, Cinevisions, Seven Arts Pictures, Inc., Seven Arts Filmed Entertainment Limited, and Seven Arts Pictures PLC (collectively the "Hoffman Parties"), and is attached at pages 1a-6a to their Petition's Appendix.

OPINIONS BELOW

The decision sought to be reviewed, namely the February 12, 2009 decision of the Ninth Circuit Court of Appeals, was unreported. It is attached at pages 1a-6a in the Appendix to the Petition of the "Hoffman Parties".

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over the matters at issue based on diversity of citizenship. 28 U.S.C. §1441(a).

Jurisdiction of this Court is invoked pursuant to 28 US.C. §1254(1) and Supreme Court (i) Rule 10(a) in that the Ninth Circuit entered a decision in conflict with prior decisions of other United States Courts of Appeals in the same important matter; (ii) Rule 10(a) in that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, by so rewarding "deplorable" threats and intimidation found to have "permeated the proceeding" as to call for an exercise of this Court's supervisory power; and (iii) Rule 10(b) in that the Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court.

RELEVANT PROVISIONS INVOLVED

The relevant statute is the Federal Arbitration Act (9 U.S.C. §1 *et seq.*), and, in particular 9 U.S.C. §10(a)(1), which provides that, upon application of any party to an arbitration, an arbitration award may be vacated insofar as that award was procured by "corruption, fraud, or undue means".

SUMMARY

Nature and Overview of the Dispute.

At issue is the federal court's improper confirmation of the tainted part of a bifurcated arbitration award procured through threats and intimidation in an arbitration before IFTA (the International Film & Television Alliance, previously

known as "AFMA" or the American Film Marketing Association).

That arbitration had been brought by Jonesfilm against the Hoffman Companies of which Peter Hoffman ("Hoffman") is the chief executive officer and controlling shareholder, namely Cinevisions, Seven Arts Pictures, Inc. ("SAP"), Seven Arts Filmed Entertainment Limited ("SAFE"), and Seven Arts Pictures PLC ("PLC"). Hoffman and those Hoffman Companies are collectively referred to herein as the "Hoffman Parties".

Because the Hoffman Parties did not timely submit evidence sought by Jonesfilm and subpoenaed by the arbitrator, the arbitrator bifurcated the arbitration proceedings – the arbitrator first held hearings in March 2006 on and decided the Hoffman Companies' breach of the underlying agreement, and the arbitrator then set and held hearings in autumn 2006 to determine the amount of "Net Receipts" (as defined in that agreement) due Jonesfilm from the Hoffman Companies.

It is undisputed that during the second part of the arbitration proceedings to determine "Net Receipts" due Jonesfilm, the Hoffman Parties engaged in a series of threats and intimidation against potentially hostile witnesses to discourage them from testifying, and against the prior arbitrator to discourage the current arbitrator from deciding, against the Hoffman Parties.

Those threats and intimidation included the filing by Hoffman of a series of lawsuits against potentially hostile witnesses scheduled to testify against the Hoffman Parties at the "Net Receipts" arbitration proceedings. Those Hoffman suits were later dismissed by the courts, which found those Hoffman suits stated no cognizable claim; were frivolous; and had been brought for the improper purpose of intimidating those witnesses. But, in the meantime, the Hoffman Parties succeeded in making their point – that testimony hostile to the Hoffman Parties would result in the witness having to incur substantial costs, time, and inconvenience to defend against and obtain dismissal of the Hoffman Parties' litigation.

Likewise, the court dismissed that Hoffman suit against the arbitrator as it found Hoffman's suit stated no cognizable claim. But, again that arbitrator had been forced to incur the substantial costs, time, and inconvenience to defend against and obtain dismissal of Hoffman's suit.

Indeed, the Hoffman Parties never disputed that they engaged in those threats and intimidation against witnesses and arbitrator, and that they did so to discourage the witnesses from testifying, and the arbitrator from deciding, against them.

During the bifurcated autumn 2006 arbitration proceedings as to "Net Receipts" due Jonesfilm, several of the witnesses testified, and the evidence confirmed, that at least $825,766 of "Net Receipts" were due Jonesfilm from the Hoffman Companies. Nonetheless, in light of Hoffman's

threats and intimidation, the IFTA Arbitrator declined to find any "Net Receipts" due Jonesfilm.

The District Court's June 18, 2007 Decision observed that the Hoffman Parties had attempted to secure a favorable award by threats against the arbitrator and witnesses. However, the District Court refused to grant Jonesfilm's motion to vacate the tainted portion of the bifurcated Arbitration Award denying Jonesfilm "Net Receipts" – as the District Court found that it could not vacate only a part of an arbitration award; Jonesfilm was not seeking to vacate other parts of the Award; and thus the District Court could not grant Jonesfilm any relief as to the tainted "Net Receipts" portion of the award procured through the Hoffman Parties' undisputed threats and intimidation [40a].

On appeal, the Ninth Circuit Court of Appeals explicitly acknowledged that "Hoffman did engage in deplorable attempts to intimidate witnesses testifying in the net receipts proceeding" [5a]. The Ninth Circuit abandoned the District Court reasoning that it could not vacate part of an arbitration award, as even prior Ninth Circuit decisions permitted part of an arbitration award to be vacated.

However, despite so acknowledging and deploring Hoffman's "attempts to intimidate witnesses testifying in the net receipts proceeding", the Ninth Circuit refused to vacate the tainted denial of "Net Receipts" to Jonesfilm on the grounds that the arbitrator was "aware of those threats prior to that proceeding", and "the threats against the

[prior] arbitrator ... permeated the entire proceeding" [5a-6a].

In other words, the courts of the Ninth Circuit have clearly rewarded the Hoffman Parties for engaging in threats and intimidation so blatant that they were disclosed and known to the arbitrator and "permeated" the entire "Net Receipts" portion of the arbitration.

Those Ninth Circuit adjudications are contrary to decisions of other circuits and other applicable law under which a court is to vacate that part of an award procured through threats and intimidation, and those threats and intimidation are instead deemed binding admissions against interest of the party which has engaged in the threats and intimidation.

STATEMENT OF FACTS

1. The 2004 AFMA Arbitration.

A first AFMA arbitration was held during 2004 in which Jonesfilm successfully asserted claims against and was granted monetary and non-monetary awards against NTTS Productions, Ltd. ("NTTS") [58a-60a]. That award was confirmed in California state court; that court found NTTS and Hoffman to be "alter egos" of each other; and that court thus adjudged Hoffman jointly and severally liable to Jonesfilm for that award against NTTS [61a].

2. The 2006 IFTA Arbitration.

During August 2005, Jonesfilm brought a second arbitration before IFTA (which had changed its name from AFMA) on a series of issues against four other Hoffman Companies, namely Cinevisions, SAP, SAFE, and PLC [62a].

A. In The March 2006 Arbitration Hearings, Conducted without Threats and Intimidation, the Hoffman Companies Were Found to Have Breached the Agreement with Jonesfilm.

The IFTA arbitration proceedings were bifurcated – hearings first held in March 2006 as to breaches by the Hoffman Companies of an Agreement with Jonesfilm [33a]. There is no contention that the Hoffman Parties engaged in threats or intimidation with respect to those March 2006 arbitration hearings. After those March 2006 hearings, the arbitrator ruled that the Hoffman Companies had breached the Agreement with Jonesfilm, and granted Jonesfilm certain declaratory and injunctive relief [33a]. Then, in light of the prior failure of the Hoffman Companies to provide subpoenaed information as to "Net Receipts" due Jonesfilm, the arbitrator scheduled a set of hearings for autumn 2006 as to the "Net Receipts" due Jonesfilm.

B. The Hoffman Parties Then Engaged against Witnesses and Arbitrator in Threats and Intimidation Which the Ninth Circuit Found "Permeated" The Autumn 2006 "Net Receipts"Hearings.

Prior to those bifurcated hearings as to "Net Receipts" due Jonesfilm, a series of suits were filed and pursued by Hoffman against witnesses scheduled to testify at those "Net Receipts" hearings and the prior arbitrator. In those suits, Hoffman sought hundreds of thousands of dollars of damages from those witnesses and arbitrator.

Indeed, during the bifurcated "Net Receipts" portion of the arbitration, the Hoffman Parties even submitted to the Arbitrator a June 21, 2006 Hoffman Memorandum on Seven Arts letterhead in which the Hoffman Parties boasted they had threatened witness Steve Ransohoff into signing a production cost certificate on which they purported to rely in their denial of "Net Receipts" due. (In that Memorandum, they so admitted that "Hoffman did certainly threaten Steve Ransohoff and as a result he [Ransohoff] did in fact sign the certificate ... which confirms the costs of production").

Thus, the second part of the bifurcated arbitration proceedings was held under the Hoffman-generated cloud of suits, threats, and intimidation of witnesses and arbitrator.

Despite those threats, Mr. Ransohoff and other witnesses testified at that arbitration as to "Net Receipts" due Jonesfilm, and their testimony and the documentary evidence confirmed that the Hoffman Companies owed Jonesfilm "Net Receipts" of at least $825,766.

However, the Hoffman Parties' threats and intimidation had succeeded at least against the

arbitrator, who, despite his prior decisions (and his findings therein that the Hoffman Companies had breached the Agreement with Jonesfilm), now declined to award Jonesfilm any "Net Receipts".

After the arbitration concluded, the courts eventually dismissed all the Hoffman suits against the witnesses and arbitrator – having found those suits stated no cognizable claim; were frivolous; and had been filed for improper purposes, such as to intimidate witnesses and arbitrator. But by then, the intimidated arbitrator had rendered the tainted second part of his bifurcated arbitration award in which the arbitrator declined to award Jonesfilm any "Net Receipts".

3. The District Court Erroneously Refused to Vacate The Tainted Part of the Arbitration Award Which Declined to Award "Net Receipts" to Jonesfilm, as the District Court Mistakenly Believed It Could Not Vacate Only Part of the Award.

Jonesfilm moved to vacate that portion of the arbitration award which had declined to grant it any "Net Receipts" on the grounds that Hoffman and his companies had engaged in threats and intimidation against witnesses and arbitrator during the bifurcated "Net Receipts" portion of the arbitration; those threats and intimidation constituted "undue means" sufficient to vacate an arbitration award under the Federal Arbitration Act [9 U.S.C. §10(a)]; and Hoffman's own admissions against interest and the testimony of other key witnesses confirmed that Jonesfilm was entitled to, and should have been awarded "Net Receipts" of at least $825,766.

However, the District Court's June 2007 Decision declined to vacate that portion of the arbitration award denying Jonesfilm "Net Receipts", as the District Court concluded (albeit erroneously) that it could not vacate only a portion of an arbitration award, and thus could not vacate that part of the award related to the second half (the "Net Receipts" portion) of the bifurcated arbitration [40a].

4. The Ninth Circuit's Decision Instead Refused to Vacate the Tainted Denial of "Net Receipts" on the Grounds That the Arbitrator Was Aware of the Threats and That "Those Threats Permeated the Entire Proceeding".

The Hoffman Parties appealed to the Ninth Circuit Court of Appeals the District Court's confirmation of that part of the arbitration award which had granted relief to Jonesfilm. In turn, Jonesfilm cross-appealed that part of the District Court decision which had denied Jonesfilm's motion to vacate the arbitrator's tainted denial of "Net Receipts" due Jonesfilm.

The Ninth Circuit abandoned the District Court's reasoning that the District Court lacked power to vacate part of the award. Indeed, it is settled Ninth Circuit law that where part of an arbitration award is improper, and that improper part is divisible from the remainder of the award, the courts may vacate the improper part and confirm the remainder. See *Comedy Club, Inc. v. Improv West Associates*, 514 F.3d 833, 845 (9th Cir. 2007) ("we may vacate part of the [arbitration] award and

leave the remainder in force"), citing *Lyle v. Rodgers*, 18 U.S. (5 Wheat) 394, 409, 5 L.Ed. 117 (1820) ("an award may be void in part, and good for the residue") and *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003) ("federal court may vacate an arbitration award, or a portion thereof").

Moreover, the Ninth Circuit found that Hoffman's attempts to intimidate witnesses and arbitrator "permeated" the proceedings and were "deplorable" [5a-6a].

But, the Ninth Circuit then denied Jonesfilm's cross-appeal on the grounds that, although Hoffman engaged in "deplorable" attempts to intimidate witnesses, the arbitrator was aware of those threats, and those threats "permeated the entire proceeding". In the words of the Ninth Circuit [5a-6a]:

> "We consider one cross-claim made by Jonesfilm, which contends that the district court erred in confirming that portion of the arbitrator's award which found no net receipts due to Jonesfilm. We disagree. While Hoffman did engage in deplorable attempts to intimidate witnesses testifying in the net receipts proceeding, all parties, including the arbitrator, were aware of those threats prior to that proceeding ... Furthermore, even if Jonesfilm could show that the arbitrator in the second arbitration was threatened by Hoffman's lawsuits against the arbitrator in the previous arbitration, those threats permeated the entire proceeding, not just the net receipts portion."

The Ninth Circuit's decision thus stands for the strange proposition that threats and intimidation of witnesses and arbitrator do not constitute "undue means" under 9 U.S.C. §10 sufficient to vacate part of the arbitration award in the intimidator's favor where those threats and intimidation are made to witnesses and arbitrator and "permeate the entire proceeding".

REASONS FOR GRANTING THE WRIT

QUESTION 1. THE NINTH CIRCUIT ERRED BY REFUSING TO VACATE AN ARBITRATION AWARD WHERE IT FOUND ARBITRANTS ENGAGED IN "DEPLORABLE ATTEMPTS TO INTIMIDATE" TESTIFYING WITNESSES AND ARBITRATOR; THE ARBITRATOR WAS AWARE OF THOSE THREATS;, AND THOSE TREATS "PERMEATED THE ENTIRE PROCEEDING".

A. The Threats and Intimidation against Arbitration Witnesses and Arbitrator Were Highly Improper.

No system of arbitration or justice can succeed if witnesses and arbitrators are so threatened or intimidated. The public policy against threats and intimidation of witnesses and so obstructing justice is evidenced by (among other things) federal and state statutes under which it is a felony to attempt to intimidate, threaten, or corruptly persuade a person to withhold or alter testimony. See, for instance, 18 U.S.C. §1512; *U.S. v. Willard*, 230 F.3d 1093 (9th Cir. 2000).

Moreover, the Hoffman Parties' threats against and intimidation of witnesses and arbitrator constitute witness and arbitrator tampering, which in turn is an inherent "fraud upon the court". As Judge Posner wrote in *Ty Inc. v. Softbelly's, Inc.*, 353 F.3d 528, 536 (7th Cir. 2003):

> 'Witness tampering is often described as a form of fraud, *King v. First American Investigations*, 287 F.3d 91, 94 (2nd Cir. 2002) (*per curiam*) ... and it is certainly very serious – indeed criminal-misconduct, 18 U.S.C. §1512(b), and for relief under Rule 60(b)(3) the victim of the fraud or other misconduct need show only that it affected his ability to present his case, not that he would have won had the fraud or misconduct not occurred [citations omitted]."

See also *Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 498 (7th Cir. 2008).

B. In Light of the Hoffman Parties' Threats Against and Intimidation of Witnesses and Arbitrator with Respect to the Bifurcated "Net Receipts" Portion of the Arbitration, the Courts Below Should Have Vacated the Tainted Denial of "Net Receipts" Due Jonesfilm.

Section 10(a) of the Federal Arbitration Act [9 U.S.C. §10(a)] seeks to protect the integrity of the arbitration and related judicial process, by vacating

an arbitration award "procured by corruption, fraud, or undue means".

As described above, the Ninth Circuit found that the Hoffman Parties' threats against and intimidation of witnesses and arbitrator "permeated" the "Net Receipts" portion of the IFTA Arbitration.

Case law from other circuits confirms that, in light of the Hoffman Parties' threats against and intimidation of witnesses and arbitrator, the courts had power under 9 U.S.C. § 10(a) to vacate the tainted denial of "Net Receipts" due Jonesfilm. See *Office and Professional Employees v. Washington Metro Area Transit Auth.* (DC. Cir. 1983), 724 F.2d 133, 140 ("arbitral award will not be enforced if it was procured by ... coercion"); *Geyer Roofing Inc. v. Roofers Local 30B* (D. N.J. 1990), 736 F.S. 573, 578-579 (arbitration award vacated for coercion); *Bonar v. Dean Witter Reynolds, Inc.* (11th Cir. 1988), 835 F.2d 1378, 1383, fns. 8 & 9 (perjury of arbitration witness required vacating tainted portion of arbitration award).

Likewise, the court also has the power to amend a judgment and grant appropriate relief where a party's misconduct (as the threats and intimidation here) sought to violate the integrity of and constituted a fraud on the judicial process. See *Dixon v. CIR*, 316 F.3d 1041, 1047 (9th Cir. 2003), citing *Chambers v. NASCO, Inc.*, 501 US. 32,44-45, 111 S. Ct. 2123, 115 L.Ed. 2d 27 (1991) and *Hazel-Atlas*, 322 US. At 250, 64 S. Ct. 997.

Further, it is difficult to imagine a more corrosive threat to public confidence in the integrity of the arbitral or judicial process than permitting threats and coercion of witnesses and arbitrator to "permeate the entire proceeding". Thus, it is important to vacate the part of the arbitration award tainted by the Hoffman Parties' threats and coercion, in order to send a clear message that threats and intimidation of witnesses and arbitrator will not be tolerated, and thereby discourage such threats and intimidation from being applied in the future.

QUESTION 2. THE NINTH CIRCUIT ERRED BY REFUSING TO DEEM ARBITRANTS' THREATS AND INTIMIDATION TO BE ADMISSIONS AGAINST INTEREST BINDING AGAINST THEM AS TO "NET RECEIPTS" DUE JONESFILM.

Under applicable rules of evidence and as a matter of public policy, a threat against or intimidation of a witness or arbitrator is deemed the threatening party's admission against interest as to matters at issue. For instance, *McCormick on Evidence*, 6th Ed. (2006) states:

> "§265. Admissions by Conduct: (e) Misconduct Constituting Obstruction of Justice.... wrongdoing by the party in connection with its case amounting to an obstruction of justice is also commonly regarded as an admission by conduct. By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means ... Accordingly, the following are

> considered under this general category of admissions by conduct: ... subornation of perjury; fabrication of documents; undue pressure by bribery, intimidation, or other means to influence a witness to testify favorably or to avoid testifying ..."

Similarly, *Wigmore on Evidence*, Vol. 2 (1979 Ed.) states [§278(2) at p. 133]:

> "Falsehood, fraud, fabrication and suppression of evidence, bribery, spoliation, and the like. It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. This inference ... operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause."

Applying those rules, case law confirms that a party's attempt to suppress testimony against him by bribery, witness tampering, or other threat or intimidation is properly admissible against, and constitutes an admission against interest of, that party. *McQueeny v. Wilmington Trust Co.* (3rd Cir. 1985), 779 F.2d 916, 921-924 [party's efforts to suborn perjury properly admissible and valuable

evidence, citing *Wigmore on Evidence* §278(2)]; *Great American Ins. Co. v. Horab* (8th Cir. 1962), 309 F.2d 262, 264 ("evidence that a litigant or his agent, has attempted to influence or suppress a witness is receivable as an admission or as an indication of the litigant's consciousness that his case is weak or unfounded or that his claim is false or fraudulent" [citations omitted]); *Longuy v. La Societe Francaise de Bienfaisance Mutuelle* (1921), 52 Cal App. 370, 375-376, 198 P. 1011 (evidence of threat, bribery, or solicitation of witness properly admissible); *McCool v. Gehret* (Del. Supreme 1995), 657 A. 2d 269, 276-277 (party's efforts to intimidate adverse witness properly admissible).

Here, the Hoffman Parties' threats against and intimidation of witnesses and arbitrator with respect to the "Net Receipts" portion of the arbitration constitute admissions against interest as to the "Net Receipts" sought by Jonesfilm – particularly as Jonesfilm's computation of "Net Receipts" was corroborated by witness testimony and documentary evidence.

CONCLUSION

Respondent/Cross-Petitioner Jonesfilm submits that the Ninth Circuit erred in the following respects:

1. In light of the Ninth Circuit's findings that the Hoffman Parties engaged during the arbitration in "deplorable" threats and intimidation against witnesses and arbitrator and that those threats and intimidation "permeated" the "Net Receipts" portion

of the arbitration, the Ninth Circuit erred in refusing to vacate the tainted part of the Arbitration Awards which denied "Net Receipts" to Jonesfilm and thereby rewarded the Hoffman Parties' threats and intimidation.

2, In failing to deem the Hoffman Parties' "deplorable" and "permeating" threats against and intimidation of witnesses and arbitrator to constitute binding admissions against interest as to the "Net Receipts" due Jonesfilm from the Hoffman Parties.

Therefore, Respondent/Cross-Petitioner Jonesfilm respectfully requests that this Court grant this Cross-Petition for writ of certiorari; reverse and/or vacate that part of the decision of the Ninth Circuit Court of Appeals denying Jonesfilm's motion to vacate the arbitrator's denial of "Net Receipts" due Jonesfilm; and remand with instructions that the threats and intimidations by the Hoffman Parties are deemed to constitute binding admissions against interest as to the amount of "Net Receipts" due Jonesfilm.

BARRY L. GOLDIN, ESQ.
Counsel of Record
3744 Barrington Drive
Allentown, PA 18104-1759
(610) 336-6680
Attorney for Respondent/
Cross-Petitioner Jonesfilm

131

(2)

No. 09-75

Supreme Court, U.S.
FILED
AUG 21 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES PLC,

Petitioners / Cross-Respondents,

v.

JONESFILM,

Respondent / Cross-Petitioner.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

PETER M. HOFFMAN
6121 Sunset Boulevard
Suite 512
Hollywood, CA 90028
(323) 634-0990

KENNETH IRVING SIDLE
Counsel of Record
GREGORY ALAN FAYER
Gipson Hoffman & Pancione
1901 Ave. of the Stars # 1100
Los Angeles, CA 90067
(310) 556-4660
Counsel for Petitioners, Peter Hoffman, Cinevisions, Seven Arts Pictures Inc., Seven Arts Filmed Entertainment Limited and Seven Arts Pictures PLC.

QUESTIONS PRESENTED FOR REVIEW

1. Was a federal district court within its discretion in confirming a portion of an arbitration award declining to award "net receipts" to a party, despite the party's assertions of misconduct in the arbitration proceedings by another party.

2. Was a federal district court within its discretion in confirming a portion of an arbitration award declining to award "net receipts" to a party, rather than deeming the party's assertions of misconduct in the arbitration proceedings to be binding admissions against interest against the other party.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW I

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE CROSS-PETITION 1

A. Respondent's First Question Raises No Issue Fit for This Court's Review 1

B. Respondent's Second Question Raises No Issue Fit for This Court's Review 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Bonar v. Dean Witter Reynolds, Inc.,
835 F.2d 1378 (11th Cir. 1988) 5

Geyer Roofing Inc. v. Roofers Local 30B, United Union of Roofers, Water Proofers and Allied Workers, AFL-CIO,
736 F.Supp. 573 (D.N.J. 1990) 4

Great Am. Ins. Co. v. Horab,
309 F.2d 262 (8th Cir. 1962) 6-7

Office and Professional Employees Intern. Union, Local 2 v. Washington Metropolitan Area Transit Authority,
724 F.2d 133 (D.C. Cir. 1983) 4

Ty Inc. v. Softbelly's Inc.,
353 F.3d 528 (7th Cir. 2003) 5

W.R. Grace & Co. v. Local 759, United Public Workers of America,
461 U.S. 757 (1983) 4

Table of Authorities -- Continued Page(s)

STATE CASES

Longuy v. La Societe Francaise De Bienfaisance Mutuelle,
52 Cal.App. 370 (1921) 6

McCool v. Gehret,
657 A.2d 269 (Del. 1995) 6

FEDERAL STATUTES

Fed. R. Civ. P. 60(b)(3) 5
Fed. R. Civ. P. 60(c) 5

STATEMENT OF THE CASE

Petitioners/Cross-Respondents Peter Hoffman, Cinevisions, Seven Arts Pictures Inc., Seven Arts Filmed Entertainment Limited and Seven Arts Pictures PLC (collectively, "Petitioners") dispute Respondent/Cross-Petitioner Jonesfilm's ("Jonesfilm" or "Respondent") Statement of the Case and Petitioners incorporate by reference Petitioners/Cross-Respondents' Statement of the Case set forth in their original Petition for Certiorari as though fully set forth herein.

REASONS FOR DENYING THE CROSS-PETITION

Respondent Jonesfilm has not identified any legal issue fit for this Court's review. Jonesfilm has not identified any important legal issue that this Court has not yet addressed. It has not identified any legal issue on which the Circuit Courts of Appeals are divided. One is hard pressed to even identify a discernable legal issue for review at all in the Cross-Petition. At bottom, Jonesfilm's Cross-Petition is little more than a thinly-veiled attempt to prejudice the Court against Petitioners by repeatedly raising unsubstantiated allegations of misconduct during the arbitration proceedings by one of the Petitioners. Such use of a Cross-Petition is improper and the Cross-Petition should be denied.

A. Respondent's First Question Raises No Issue Fit for This Court's Review

Respondent Jonesfilm repeatedly alleges that the arbitration proceeding was "permeated" with "coercion," "threats," and "intimidation." On this

basis alone, Jonesfilm urges that the only portion of the arbitrator's award in favor of Petitioners – *viz.*, the denial of Jonesfilm's request for an award of "net receipts" – should have been reversed by the District Court.[1]

As a factual matter, neither the arbitrator in the Second Arbitration nor the District Court made any such finding. The District Court rejected Jonesfilm's arguments regarding procurement of this portion of the arbitral award through "undue means." *See* App. 38-40a. Jonesfilm cited two grounds for its assertions of undue means: (i) "refus[ing] to provide [] subpoenaed discovery" and (ii) "threatening to file costly civil litigation . . . ." App. 39-40a. With respect to (i), as stated in Petitioners' Petition, Petitioners objected to arbitral jurisdiction, and thus did not participate in the arbitration proceedings except to file objections to jurisdiction. As the District Court pointed out, however, the arbitrator "held hearings" to determine all facts relevant to the arbitration award. App. 39a. The arbitrator "was satisfied the information adduced at the hearing allowed him to calculate Net Receipts," and the arbitrator "reviewed and rejected [Jonesfilm's] arguments" regarding "undue means." *Id.* The District Court agreed with the arbitrator and "decline[d] to give [Jonesfilm] a 'second bite at the apple.'" *Id.* With respect to (ii), the District Court noted that Jonesfilm "*contends* that the Net Receipts portion of the Final Award was improperly procured by other 'undue means' – *i.e.*,

---

[1] Jonesfilm's repeated statements that these allegations are "undisputed" and that Petitioners have "never disputed" these allegations (*see, e.g.*, Cross-Petition at 3-4) are patently false.

intimidation and coercion." App. 40a (emphasis added). The District Court then properly rejected Jonesfilm's unsubstantiated allegations that threats of lawsuits against the arbitrator somehow resulted in the arbitrator's favoring of Petitioners. *Id.* The District Court pointed out that the arbitrator ruled against Petitioners on practically every issue in the arbitration and even awarded Jonesfilm "its hotly contested fees." *Id.* It thus strains credibility to suggest that even if such threats and coercion had been found – which they had not – that such conduct would have affected only the Net Receipts award. "[Jonesfilm] cannot have it both ways." *Id.* In short, the District Court never endorsed Jonesfilm's allegations or made findings of "threats and coercion" by Petitioners, as Jonesfilm wrongly states.

While the Ninth Circuit opinion makes one passing statement that appears to endorse the Jonesfilm view that threats were made by one of the Petitioners, *see* App 5a, it immediately went on to cast doubt on such a reading of that statement, saying that "*even if Jonesfilm could show . . .*" that the alleged threats and intimidation had occurred, it would not be entitled to relief on that basis. App. 6a. Indeed, the Court of Appeals quickly dispatched Jonesfilm's arguments predicated on such threats. The Court of Appeals stated that even if such misconduct had occurred, "all parties, including the arbitrator, were aware of those threats prior to that proceeding." App. 5a. It then held, citing its own binding precedent, that a party may not get a "second bite at the apple" by asserting "undue means" where the alleged undue means were apparent in the arbitration proceeding. App. 6a. In short, the Ninth Circuit rejected Jonesfilm's arguments and it is far

from clear that the Ninth Circuit intended in any way to endorse the factual predicate of those arguments.

Regarding the legal effect of a finding of coercion (which was not made here), Jonesfilm cites only three cases addressing the effect of coercion on an arbitration award, none of which provides any basis for vacating an award under the circumstances here presented. The first case, *Office and Professional Employees Intern. Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133 (D.C. Cir. 1983), involved allegations of misconduct, partiality and bias *by an arbitrator* that are wholly unlike the allegations in this case. *Id.* at 140. While the D.C. Circuit stated the general proposition that "an arbitral award will not be enforced if it was procured by fraud or coercion," *id.*, it rejected the claim that the award should be vacated for fraud or coercion under the circumstances there presented.[2] Similarly, *Geyer Roofing Inc. v. Roofers Local 30B, United Union of Roofers, Water Proofers and Allied Workers, AFL-CIO*, 736 F.Supp. 573 (D.N.J. 1990), is inapposite. There the court found that the victim had been coerced into entering into the arbitration agreement in the first place, and that the arbitration proceedings were blatantly stacked in favor of the union. *Id.* at 578. Indeed, the court found that the union had "informed Geyer of the [arbitration] board's decision before the arbitration took place." *Id.* Jonesfilm has alleged no remotely comparable

---

[2] As the D.C. Circuit pointed out, this principle is a "corollary" of the principle articulated by this Court in *W.R. Grace & Co. v. Local 759, United Public Workers of America*, 461 U.S. 757, 766 (1983), that arbitration awards that are contrary to well-defined public policy will not be upheld.

misdeeds. *See also Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 n.8 & n.9 (11th Cir. 1988) (vacating portion of award only after finding that a material witness had perjured himself).

Jonesfilm also cites cases decided under Rule 60(b)(3) as authority for ordering relief from an arbitral award based on "fraud . . . , misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). Even assuming that 60(b)(3) is applicable to arbitral awards (which is far from clear), that Rule is inapplicable here because Jonesfilm never requested relief under Rule 60(b)(3). As a result, *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 537 (7th Cir. 2003), and the other 60(b)(3) cases cited by Jonesfilm are inapposite. Moreover, the time for invoking that 60(b)(3) has expired. Fed. R. Civ. P. 60(c) (stating that a motion under Rule 60(b)(3) "must" be made "no more than a year after the entry of the judgment. . . ."); *cf.* App. 21a (June 20, 2007 order confirming the arbitration awards).

B. Respondent's Second Question Raises No Issue Fit for This Court's Review

Jonesfilm's second question differs little from its first question, and it suffers from the defects detailed above. In addition, the second question attempts to fold in the evidentiary issue of whether Jonesfilm's allegations of misconduct should not merely have been considered and weighed – as the courts below clearly did – but should have been deemed a binding admission against interest as to the Petitioners. Indeed, Jonesfilm's arguments go further to suggest that a court faced with allegations of undue influence over a witness must simply direct a ruling against the party against whom the allegations are made as a

matter of law. Such a rule has no basis in law or logic.

As an initial matter, as detailed above, there has been no finding of misconduct here by the arbitrator or by any court. As a result, a fundamental premise of Jonesfilm's argument is lacking and its argument cannot stand.[3]

Jonesfilm's cases simply do not support its position here. Indeed, none of Jonesfilm's cases even supports the lesser contention that allegations of undue influence over a witness should operate as an admission against interest. The cases cited by Jonesfilm merely recite the uncontroversial proposition that evidence of undue influence over a witness is admissible against that party, and that a court or jury is free to draw appropriate conclusions from that evidence. *See Longuy v. La Societe Francaise De Bienfaisance Mutuelle*, 52 Cal.App. 370, 376 (1921) (stating only that the lower court "should have at least permitted the further offer of proof" as to allegations of undue influence of a witness); *McCool v. Gehret*, 657 A.2d 269, 277 (Del. 1995) (holding merely that evidence of undue influence of a witness was admissible to show that "Dr. Gehret considered his case to be weak"). As the Court of Appeals in the principal case cited by Jonesfilm held, while evidence of undue influence may be "an indication of the litigant's consciousness that his case is weak or unfounded or that his claim is false or fraudulent," courts and triers of fact are free to draw their own conclusions about such evidence. *Great*

---

[3] Moreover, even assuming *arguendo* that there were some finding of misconduct by Petitioners, Jonesfilm waived this argument by failing to raise it below. *See* App. 3-6a.

Am. Ins. Co. v. Horab, 309 F.2d 262, 265 (8th Cir. 1962). Indeed, the court emphasized, "the exclusion of the evidence in question in this civil case did not constitute or equate with a denial of substantial justice, [and] its admission or exclusion fell within the area of judicial discretion, and [] there was no abuse of that discretion here." *Id.* Thus, none of Jonesfilm's cases stands for, or even suggests, the extraordinary proposition that a party's allegations of undue influence over a witness require a court to direct a ruling against the party against whom the allegations are made as a matter of law. Such a rule simply makes no sense.

Jonesfilm's request for an admission against interest to be directed as a matter of law is particularly facile given the actual alleged misconduct at issue here. Indeed, the principal conduct on which Jonesfilm's allegations of undue influence of witnesses was based occurred *9 1/2 years prior to the arbitration*. Respondent's claim that a witness' cost estimate at the arbitration was "coerced" by conduct that occurred 9 1/2 years prior to the arbitration is baseless.[4]

---

[4] The arbitrator's decision rejecting Respondent's Picture Revenue Claim was based on a final cost estimate delivered by Steven Ransohoff, the principal executive of Film Finances, Inc., the completion guarantor of the First Sequel, on May 5, 1997. This final cost estimate was required as a delivery item under the terms of the distribution agreement between Petitioner Cinevisions and Trimark Pictures Inc. ("Trimark"), the domestic distributor of the First Sequel, guaranteed by Film Finances to the production financier to ensure full payment of Trimark's distribution guarantee. Respondent apparently claims that Petitioners "coerced" and "threatened" Ransohoff to deliver this final cost estimate in May 1997 when Petitioners threatened to sue Film Finances if it did not receive the full distribution

Jonesfilm's second question presents no legal issue fit for this Court's review.

CONCLUSION

Petitioner/Cross-Respondents respectfully request that this Court deny the Cross-Petition for the reasons set forth herein.

Respectfully submitted,

PETER M. HOFFMAN
6121 Sunset Boulevard
Suite 512
Hollywood, CA 90028
(323) 634-0990

KENNETH IRVING SIDLE
Counsel of Record
GREGORY ALAN FAYER
Gipson Hoffman & Pancione
1901 Avenue of the Stars
Suite 1100
Los Angeles, CA 90067
(310) 556-4660
Counsel for Petitioners, Peter Hoffman, Cinevisions, Seven Arts Pictures Inc., Seven Arts Filmed Entertainment Limited and Seven Arts Pictures PLC.

---

guarantee from Trimark by reason of Ransohoff's failure to deliver the required final cost estimate, as he was legally required to do. But the alleged "coercion" of Ransohoff (to comply with Film Finances' contractual obligation) occurred in May 1997 – more than 9 1/2 years before Ransohoff's testimony in the Second Arbitration, which testimony freely confirmed his certification of the final estimated cost of the First Sequel, as set forth in his certificate of 9 1/2 years previous. As is clear from the Cross-Petition, this is the factual basis of Jonesfilm's claim of "coercion" or "intimidation," not the equally suspect claim by Jonesfilm of a similar threat of litigation by Petitioners against another witness at the time of the Second Arbitration (which the Court of Appeals appears to have mistakenly believe to be the basis for Respondent's argument).